No. 10-970

In The
Supreme Court of the United States

LIVONIA PROPERTIES HOLDINGS, L.L.C.,

Petitioner,

v.

12840-12976 FARMINGTON ROAD HOLDINGS, L.L.C.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

JAMES L. ALLEN
Counsel of Record
LARRY J. SAYLOR
MILLER, CANFIELD, PADDOCK AND STONE, PLC
840 W. Long Lake Road, Suite 200
Troy, MI 48098
248.879.2000
Allenj@millercanfield.com

Counsel for Respondent

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COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF QUESTION PRESENTED

Did the Court of Appeals properly affirm the district court's exercise of discretion in denying Petitioner's request to enjoin a foreclosure sale under the Michigan statute allowing foreclosure by advertisement, Mich. Comp. L. ("M.C.L.") § 600.3204, where the district court determined that (1) Petitioner had not established the requisite likelihood of success on the merits; (2) Petitioner had failed to demonstrate irreparable harm; its alleged injury was "self-inflicted or speculative" since Petitioner had failed to make its mortgage payments and had a statutory right to redeem the property for six months after the foreclosure sale; (3) the harm to Respondent ($107,850 per month in lost interest) outweighed any potential harm to Petitioner; and (4) public policy "does not favor permitting [Petitioner] to escape its contractual obligations, especially where it cannot satisfy the other factors" for a preliminary injunction? Pet. App. 50a.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent 12840-12976 Farmington Road Holdings, L.L.C., states the following:

12840-12976 Farmington Road Holdings, L.L.C., a Maryland limited liability company, is a wholly owned subsidiary of Bank of America, N.A. as successor to LaSalle Bank National Association, as Trustee for the registered holders of LB-UBS Commercial Mortgage Trust 2005-C1, Commercial Mortgage Pass-Through Certificates, Series 2005-C1, a REMIC trust. No publicly owned company owns 10% or more of the membership interest of 12840-12976 Farmington Road Holdings, L.L.C.

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INTRODUCTION

The Petition should be denied for at least three reasons. First, Petitioner has failed to identify any question worthy of this Court's attention. Petitioner's complaint in this diversity case asserts claims under the Michigan statute governing mortgage foreclosure by advertisement. The Eastern District of Michigan denied Petitioner's motion for preliminary injunction in the exercise of its discretion under Fed. R. Civ. P. 65, Pet. App. 19a, and the Sixth Circuit affirmed that exercise of discretion in its unpublished opinion. Pet. App. 1a. Both decisions rest on the conclusion that Petitioner failed to establish the requisite strong likelihood of success on its Michigan state law claims. Petitioner identifies no constitutional issue, no substantive question of federal law, no split among the circuits, and no conflict with any decision of this Court. Moreover, the law of Michigan is unique and the decisions under review have no impact in any other state.

Second, the decisions of the Sixth Circuit and the Eastern District of Michigan were correct. Michigan's foreclosure statute merely requires the foreclosing lender to establish a "record chain of title" before commencing a foreclosure by advertisement. M.C.L. § 600.3204(3). The district court and the Sixth Circuit both correctly held that (a) under settled Michigan law, interim transfers of the note and mortgage "in blank" before transfer to the Trust (and completion of the assignments "in blank" by filling in the name of the Trust) were proper and immaterial to

the "record chain of title"; (b) compliance with the Michigan statute is established by an examination of the records of the Register of Deeds; and (c) Petitioner lacked standing to contest these interim assignments of the note and mortgage "in blank." The Michigan law the courts below applied is clear and well settled. The district court properly distinguished the Massachusetts decision on which Petitioner relies. The Sixth Circuit motion panel correctly ruled that "an applicant for a stay or injunctive relief 'is always required to demonstrate more than the mere "possibility" of success on the merits.' . . . Upon review and consideration, we cannot conclude that [Petitioner] has done so." Pet. App. 17a-18a (citation omitted). The Sixth Circuit merits panel properly concluded that Petitioner's contentions were "disingenuous," and that "[t]he district court correctly rejected all of [Petitioner's] claims regarding 'record chain of title,' and properly concluded that [Petitioner] had little likelihood of success on the merits." Pet. App. 12a-13a.

Finally, the record amply demonstrates that Petitioner is both unwilling and unable to present the facts and the law properly, fully and fairly, and in compliance with the Rules of this Court. This, alone, is grounds to deny the Petition.

STATEMENT OF THE CASE

On December 30, 2004, Petitioner entered into a $16,300,000 Commercial Loan (the "Loan") from

Lehman Brothers Bank FSB that was secured by a mortgage on four large industrial properties in Livonia, Michigan. Petitioner leases these properties to numerous tenants. *See* C.A. E.R. 16-4, ¶ 6, C.A. E.R. 16-5 through 16-9.

Only one week later (January 6, 2005), but effective as of January 11, 2005, Lehman Brothers Bank FSB assigned the Loan to LaSalle Bank National Association, as Trustee for the registered holders of LB-UBS Commercial Mortgage Trust 2005-C1, Commercial Mortgage Pass-Through Certificates, Series 2005-C1 (the "Trust"),[1] which purchased the Loan for value. *See* C.A. E.R. 16-4, ¶ 7. Title searches filed with the district court by both Petitioner and Respondent disclosed that (1) the Mortgage was recorded with the Wayne County, Michigan, Register of Deeds (the "Register") on January 24, 2005; and (2) the Assignment of the Mortgage to the Trust was recorded with the Register on November 17, 2005. *See* C.A. E.R. 16-11, p. 2 of 7. After this assignment, over nearly four years, Petitioner made over $5 million in mortgage payments to the Trust without ever questioning the Trust's title to the mortgage at issue. *See* Pet. App. 20a.

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[1] Petitioner understood that the Loan would be sold on the secondary market and securitized at the time of origination and so agreed in Paragraph 16.1 of the Mortgage *See* C.A. E R. 16-7, p. 14 of 23 The "Trust" is a REMIC trust which is a Real Estate Mortgage Investment Conduit qualifying for "pass-through" tax treatment under the Internal Revenue Code, 26 U S C §§ 860A to 860G, and associated regulations.

Petitioner defaulted on the Loan in October 2009. On December 22, 2009 – over two months after Petitioner defaulted – Petitioner entered into a Prenegotiation Agreement with the Trust through its Special Servicer, CWCapital Asset Management LLC, so the parties could begin discussions on alternative resolutions to Petitioner's defaults. *See* Resp. App. 25a. In the Prenegotiation Agreement, Petitioner and its principal, David M. Clapper, acknowledged that the Trust was the holder of the Note and other Loan Documents. *See id.*, p. 1. Petitioner also "acknowledge[d] and agree[d] that it currently [held] no claim against [the Trust], including, but not limited to, set-off, recoupment, estoppel, waiver, cancellation of instruments, rescission, novation or excuse of performance under the Loan Documents by virtue of any action(s) or inaction(s) of Holder or any of its predecessors-in-interest, if any." The Prenegotiation Agreement specifically identifies Andrew Mychalowych, counsel for the Petitioner, as one of the Petitioner's representatives. Resp. App. 29a, 38a-39a.

In preparation for foreclosure, the Trust, through its Special Servicer, formed Respondent (12840-12976 Farmington Road Holdings, L.L.C.) and assigned the Loan and Loan Documents to Respondent. *See* C.A. E.R. 16-4, ¶ 9. The Assignment of Mortgage from the Trust to Respondent was dated March 3, 2010 and recorded on March 4, 2010. *See* C.A. E.R. 16-14 through 16-18. This was well before Respondent published the first notice of foreclosure on March 24, 2010. *See* C.A. E.R. 16-21.

Petitioner omits significant facts and procedural history that bears on the issues before the Court if certiorari were granted. First, Petitioner fails to mention that its own title search attached to its original brief in the district court confirmed the record chain of title. Pet. App. 6a-7a.

Second, Petitioner fails to mention or even attach the district court's 17-page opinion and order denying Petitioner's motion for reconsideration. (*See* Resp. App. 1a, *infra*). This omission violates this Court's Rule 14(i)(i) and (iii). In that opinion, the district court found:

> Here, the [Petitioner] acknowledges that a *record chain of title* exists evidencing transfers from the original mortgage holder (Lehman Brothers) to the Trust, and from the Trust to [Petitioner]. There are no unaccounted for or broken "links" in this chain.

Resp. App. 9a (emphasis in original). The district court also concluded that Petitioner's arguments regarding the Massachusetts opinion were "disingenuous at best." Resp. App. 22a, n. 18.

Third, Petitioner neglects to mention that the district court examined in chambers the original note and allonges (assignments of the note), mortgage and mortgage assignments before denying Petitioner's motion for preliminary injunction and dissolving the

temporary restraining order. *See* Pet. App. 21a-24a; 32a-33a.[2]

Fourth, Petitioner fails to mention the Prenegotiation Agreement in which it waived any claims. The Prenegotiation Agreement was a significant basis for the district court's holding that Petitioner had failed to establish the requisite likelihood of success on the merits. *See* Pet. App. 43a. Indeed, the Court of Appeals deemed Petitioner's claims "disingenuous" in light of the Prenegotiation Agreement. *See* Pet. App. 12a.

Finally, Petitioner fails to mention that under M.C.L. § 600.3240(7), it had the right to redeem the property for six months after the foreclosure sale, which occurred on June 16, 2010. *See* C.A. Doc. 006110654965, p. 3. The district court acted on Petitioner's motion for preliminary injunction and its motion for rehearing before the sale date. Pet. App. 19a, Resp. App. 1a. The Sixth Circuit acted on Petitioner's request for injunction pending appeal before the sale date, Pet. App. 16a, then issued its opinion on the merits within the six-month redemption period. Pet. App. 1a. Michigan's foreclosure statute allows

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[2] Respondent's counsel made a number of offers to allow Petitioner's counsel to inspect the original note. Petitioner's counsel rebuffed these offers, requiring the district court to review the original documents: "The Court: You [Petitioner's counsel] wouldn't be in this pickle had you gone over to the [Respondent's counsel] office and looked at these documents. You made me look at them for you." Tr. May 13, 2010, C.A. E.R. 27, p. 7.

redemption during this period for the *amount bid* at the foreclosure sale (plus interest), and not the amount of the entire mortgage debt as is customary in most other states that permit redemption. M.C.L. § 600.3240(2). Petitioner's assertion that it was a "victim[ ] of this Wild West," Pet. 26, is belied by the fact that Petitioner had the right to redeem from the foreclosure sale for the bid amount of $5,900,000 (plus interest)[3] even after the Court of Appeals confirmed that "[Respondent] appears to be in full compliance with the [Michigan foreclosure] statute." Pet. App. 8a.

REASONS FOR DENYING THE WRIT

I. The case involves a unique issue of Michigan law that does not merit this Court's review.

The district court denied Petitioner's requested preliminary injunction on the grounds that Petitioner had not established any of the four elements necessary to obtain injunctive relief under Fed. R. Civ. P. 65, and the Sixth Circuit affirmed. Both courts correctly

[3] This was the bid amount for the foreclosure sale conducted June 16, 2010 for three of the four properties. The foreclosure sale for the fourth property was delayed due to an environmental issue which was later resolved. The sale for the fourth property occurred February 10, 2011 with a bid amount of $3,500,000. Respondent is now left with a deficiency (loss) of well over $7,000,000.

applied the standard established by this Court in *Winter v. Natural Resources Def. Council*, 555 U.S. 7, 129 S.Ct. 365, 376 (2008), and the Sixth Circuit in *ACLU of Ky. v. McCreary County*, 354 F.3d 438, 445 (6th Cir. 2003). *See* Pet. App. 28a. Petitioner does not contend that the Sixth Circuit or the district court failed to apply the correct federal standard for injunctive relief. Instead, Petitioner focuses on a single issue: probability of success on the merits. This is a pure issue of Michigan law that impacts foreclosures in Michigan and no other state, and does not merit review by this Court.[4] Another Northwest Territory state, Minnesota, is the only other state with a foreclosure by advertisement process similar to Michigan, but the specific statutory provision on "record chain of title" is not found in the Minnesota foreclosure statute. *See* Minn. Stat. § 580.02.

This Court grants petitions "for compelling reasons," which typically concern an "important question of federal law." Supreme Court Rule 10. The Court "do[es] not normally grant petitions for certiorari solely to review . . . an application of state law. . . ." *Leavitt v. Jane L.*, 518 U.S. 137, 144 (1996). Moreover, when "dealing with issues of state law that enter into

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[4] The historical basis for Michigan's foreclosure statute can be traced to 1846. *See* Chap. 130, Mich. R. S. 1846. Earlier statutes from the Northwest Territory, the Mortgage Act of 1827 (2 Terr. Laws 431) and the Mortgage Act of 1833 (3 Terr. Laws 1065), authorized foreclosure by advertisement, but these statutes differed substantially from the 1846 Act

judgments of federal courts, [the Court is] hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable." *Propper v. Clark*, 337 U.S. 472, 486-87 (1949). The Petition raises no federal question and requires interpretation of just one unique section of the Michigan foreclosure statute, M.C.L. 600.3204(3). It does not merit review by this Court.

II. The Sixth Circuit decision is correct.

A. Petitioner waived its claims in the Prenegotiation Agreement.

The Petition fails to discuss the Prenegotiation Agreement, which waives Petitioner's claims and forms an independent basis for the holding that Petitioner had failed to establish the requisite likelihood of success on the merits. *See* Pet. App. 12a, 43a.

Respondent is a limited liability company wholly owned by a REMIC Trust. The Trust formed Respondent shortly before the foreclosure in order to take title of the foreclosed property in the name of Respondent as a single purpose entity rather than taking title in the Trust. Defaulted loans in REMIC trusts are serviced by the "special servicer" under the applicable trust document, the "Pooling and Servicing Agreement."[5] The Special Servicer here was CWCapital

[5] *See* Talcott J. Franklin & Thomas F Nealon, Mortgage and Asset Backed Securities Litigation Handbook, § 1.8 (Thomson West 2010).

Asset Management LLC. Special servicers enter into "prenegotiation agreements" with borrowers on defaulted commercial mortgage loans so the parties may freely enter into negotiations regarding a possible restructure of the loan rather than resorting to foreclosure.[6]

Here, Petitioner entered into the Prenegotiation Agreement with the Trust for the benefit of the Trust, and its successors and assigns. *See* Resp. App. 25a. The Sixth Circuit found Petitioner's claims to be "disingenuous" in light of the waivers in this Agreement:

> Any claim by [Petitioner] that [Respondent] or the Trust before it was not a valid assignee of the mortgage rings hollow, as [Petitioner] made mortgage payments directly to the Trust for years, without questioning the Trust's right to receive payment. Further, when [Petitioner] first encountered difficulties in repayment, it entered into a prenegotiation agreement with the Trust. Standing alone, the existence of that agreement makes [Petitioner's] current questioning of the mortgage's ownership or assignments appear disingenuous, but the agreement's specific terms further weaken the claim. In the agreement, [Petitioner] expressly acknowledged that "[t]he Loan Documents are in full force and effect and are binding on the Borrower in accordance with their terms."

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[6] *See* 1 Stuart M Saft, Commercial Real Estate Workouts, § 3.24 (Thomson West 3d ed 2009).

Pet. App. 12a. The district court similarly held:

> [Respondent] submits that [Petitioner] made over $5,000,000 in payments to the Trust without questioning whether it was paying to the appropriate entity. It was only *after* [Petitioner] defaulted, and a foreclosure sale was imminent, that [Petitioner] raised supposed irregularities in the Assignments. And as recently as December 22, 2009, [Petitioner] expressly acknowledged that "the Loan Documents are in full force and effect and are binding on [Petitioner] in accordance with their terms", "the Loan Documents continue to constitute [Petitioner's] legal and enforceable obligations", and "[Petitioner] . . . currently holds no claim against Holder." Therefore, even if [Petitioner] was permitted to challenge the validity of the assignments, [Respondent] would appear to have valid defenses of laches, estoppel, waiver, and/or ratification sufficient to rebut [Petitioner's] challenges at this stage in the proceedings.

Pet. App. 43a (emphasis in original). Petitioner does not challenge these holdings, which make the present case a poor vehicle for the issue Petitioner seeks to present.

B. Michigan law is well settled that intermediate mortgage assignments need not be recorded.

Petitioner contends that the phrase "record chain of title" in M.C.L. § 600.3204(3) requires every link

in the chain to be recorded before foreclosure by advertisement.[7] In reality, as the district court and the Sixth Circuit held, Michigan law is clear that intermediate assignments need not be recorded, and assignments "in blank" as occurred here do not defeat the right to foreclose by advertisement.

The Michigan Supreme Court has consistently held that intermediate assignments need not be recorded. In *Feldman v. Equitable Trust Co.*, 278 Mich. 619, 270 N.W. 809, 810-11 (1937), the court held that the foreclosure by advertisement statute provided that the existence of unrecorded equitable rights in the mortgage did not defeat the right to foreclose by advertisement. In *Peterson v. Jacobs*, 303 Mich. 329, 6 N.W.2d 533 (1942), an interim holder held an assignment of a loan for eight months before depositing it into a trust, and the assignment to the interim entity was never recorded. The court upheld the foreclosure sale, holding the failure to record the interim assignment did not invalidate the sale. Most recently, in *Arnold v. DMR Financial Services*, 448 Mich. 671, 532 N.W.2d 852 (1995), the court reaffirmed its holding in *Feldman* and held the statute required only

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[7] Petitioner's argument is far from clear: The Petition interchanges "chain of title" (Pet. i, 9, 22) with "record chain of title" (Pet. ii, 12, 22), "contract chain" (Pet. 10), "chain of ownership" (Pet 13), and "'record chain'" (Pet. 15). As the Sixth Circuit noted, Petitioner "offers no definition of the term 'record chain of title,' and interchanges the phrase with 'chain of title' throughout its brief." Pet. App 6a.

that the interest of the mortgagee seeking to foreclose be recorded:

> In *Feldman*, this Court held . . . that only the record holder of the mortgage could foreclose by advertisement, and the mortgagor was not affected by the fact that others had an unrecorded interest in the mortgage. This Court determined that a foreclosure by the record mortgagee was proper, and the presence of an unrecorded security assignment was irrelevant. It noted that the existence of equitable rights in the mortgage by persons other the person who had legal title alone did not create a valid objection on behalf of the mortgagor if the mortgagor was unaffected by those interests.
>
> We reach the same conclusion in the instant case. Only the record holder of the mortgage has the power to foreclose; the validity of the foreclosure is not affected by any unrecorded assignment of interest held for security.

448 Mich. at 676-78 (footnotes omitted). The Michigan Supreme Court reversed the February 1994 decision of the Michigan Court of Appeals, which had required "any assignment" of a mortgage to be recorded. *See* 448 Mich. at 675.

The Michigan Supreme Court in *Arnold* construed the pre-1994 version of M.C.L. § 600.3204, which required that the mortgage and "all assignments" have been recorded. While the appeal in *Arnold* was pending, the Michigan Legislature, based

upon input from the Financial Institution Bureau and the Michigan Land Title Association, amended the statute to require only a "record chain of title."[8] The legislative history reflects that the purpose of this amendment was to overrule the erroneous Court of Appeals decision:

> The bill would provide a speedy resolution to problems raised by recent court decisions. Of particular concern is a court of appeals decision [in *Arnold*] that all mortgage assignments must be recorded with the register of deeds in order for a foreclosure to go forward. . . . By eliminating an overbroad requirement for all assignments to be recorded, . . . the bill would better reflect the real world of mortgage finance.

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[8] Michigan House Bill 5721 was amended to conform to the Senate Bill, and the legislature adopted it as 1994 Public Acts of Michigan, Act 397. The 1994 version of M.C.L § 600 3204(1)(c) stated

> (1) A party may foreclose by advertisement if all of the following circumstances exist:
>
> > (c) The mortgage containing the power of sale has been properly recorded and, if the party foreclosing is not the original mortgagee, a record chain of title exists evidencing the assignment of the mortgage to the party foreclosing the mortgage.

In 2004, the legislature rewrote the section, carrying over the phrase "record chain of title" to the current M.C L. § 600.3204(3).

Resp. App. 45a-46a, Michigan House Legislative Analysis Section, Analysis of House Bill 5721 (Sept. 20, 1994).

The Michigan Supreme Court in *Arnold* quoted the 1994 statutory amendment in support of its decision to overrule the Court of Appeals decision. *See* 448 Mich. at 677 n. 7. Thus, Petitioner's contention that the Michigan Supreme Court in *Arnold* held that "'all assignments [must be recorded]'", Pet. 21, misrepresents the holding in *Arnold* and attempts to mislead this Court.

In support of its contention that all assignments must be recorded, Petitioner also relies upon Michigan Attorney General Opinion No. 7147 and claims it was an abuse of discretion that neither the district court nor the Sixth Circuit addressed that opinion. Pet. 18. Petitioner fails to advise the Court, however, that the Editor's Note to that opinion states that "OAG No. 7147 has been superseded by subsequent legislative action." Resp. App. 61a. The legislation referenced in the note is the July 1, 2004 amendment to M.C.L. § 600.3204.

As the Sixth Circuit correctly observed, the purpose of the Michigan "chain of title" requirement is to avoid the risk that a borrower may be required to pay the debt twice. *See* Pet. App. 10a. There is no risk that Petitioner could be required to pay the debt twice because, on the facts of this case, Petitioner had no "genuine claim that [Respondent] is not the rightful owner of the loan." *Id.* This conclusion is correct

and dispositive and there is no need for review by this Court.

C. Petitioner lacks standing to challenge the intermediate assignments.

The Sixth Circuit also correctly concluded that Petitioner could not go outside the record chain of title, and lacked standing to challenge the assignments of the note and mortgage given the fact that Respondent had possession of the original note, original allonges, original mortgage, and original assignments of mortgage:

> [Petitioner] is correct that a party subject to foreclosure has standing to challenge whether a lender holds record chain of title, but that determination is limited to an examination of the public records. In its opinion on [Petitioner's] motion to reconsider, the district court clarified this difference, pointing out that [Petitioner] "acknowledges that a *record chain of title* exists," but is "unsatisfied with the *record chain of title*." . . . Because [Petitioner] finds no claim in the public records, it is seeking to "go beyond the statutory requirements to inspect each and every aspect of every contract or agreement" in the history of the loan.

Pet. App. 11a (emphasis in original).

The conclusion that Petitioner lacks standing to challenge the validity of unrecorded interim assignments is a cornerstone of both the Sixth Circuit and

district court opinions. *See* Pet. App. 9a-11a and 37a-42a. As the district court noted, for over a century, state and federal courts around the country have applied similar reasoning to hold that a litigant who is not a party to an assignment lacks standing to challenge that assignment. Pet. App. 40a-42a (*citing Liu v. T & H Mach., Inc.*, 191 F.3d 790 (7th Cir. 1999) (party to underlying contract lacks standing to attack any problems with the reassignment of that contract); *Blackford v. Westchester Fire Ins. Co.*, 101 F. 90, 91 (8th Cir. 1900) ("As long as no creditor of the assignor questions the validity of the assignment, a debtor of the assignor cannot do so."), and six federal district court and state court cases). Petitioner does not contend that there is a disagreement among the Courts of Appeals on whether it has standing to challenge unrecorded assignments. Indeed, true to form, Petitioner does not even address the standing issue even though both the lower courts spent significant portions of their opinions explaining why Petitioner lacked standing. This unchallenged holding makes the present case a poor vehicle for review.

D. The Massachusetts decision in *Ibanez* is irrelevant.

Petitioner cites the Massachusetts Land Court decision in *U.S. Bank N.A. v. Ibanez*, 2009 WL 3297551 (Mass. Land Ct. Oct. 14, 2009), *aff'd*, 458 Mass. 637, ___ N.E.2d __, 2011 WL 38071 (Jan. 7,

2011). Pet. 17.[9] *Ibanez* differs legally and factually from the case under review. The district court discussed *Ibanez* at great length in the opinion which Petitioner omitted from its Appendix. *See* Resp. App. 18a-24a. As the district court noted, the question in *Ibanez* was "did the Plaintiff [bank] have 'the right . . . to foreclose the subject mortgage in light of the fact that the assignment of the foreclosed mortgage into the [bank] was *not executed or recorded* until *after* the exercise of the power of sale.'" Resp. App. 18a (emphasis and ellipsis in original), *citing* 2009 WL 3297551 at *1. Here, unlike *Ibanez*, Respondent had physical possession of the original note and allonges, and the assignments of mortgages to Respondent were of record with the Register before Respondent began publication of the notice of foreclosure under the Michigan statute. The district court correctly concluded:

> Thus, because [Petitioner] plainly understands that, unlike Massachusetts law, Michigan law does not permit the note and mortgage to be held by different parties, I find [Petitioner's] reliance on *Ibanez* – and [Petitioner's] misrepresentation of the legal basis on which *Ibanez* was decided – to be disingenuous at best.

Resp. App. 22a, n. 18.

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[9] Petitioner fails to note that the Massachusetts Land Court decision was affirmed on January 7, 2011. The affirmance has no impact on the issues before this Court

As noted, *Ibanez* is distinguishable from this case because the assignment of the foreclosed mortgage was in blank *at the time the mortgagee exercised the power of sale*. In the present case, while the assignment from Lehman Brothers initially was in blank, the name of the assignee (the Trust) was thereafter inserted into the assignment and properly recorded. The Trust, in turn, assigned the Mortgage to Respondent, and that assignment was in the record chain of title before the foreclosure by advertisement. As the district court noted, such assignments in blank are proper under Michigan law. *See* Pet. App. 45a-46a, *citing Mason Lumber Co. v. Collier*, 41 N.W. 913 (Mich. 1889) ("an assignment, like the one in question here, if filled in with the name of an assignee, after deliver[y] in blank, with the consent of the assignor, would become operative and valid in the party whose name was thus inserted").

In its brief to the Sixth Circuit, Petitioner merely suggested that *Ibanez* should be used as "guidance" since the decision was "not binding." C.A. Doc. 006110676609, p. 60. Given this timid suggestion, and because the district court thoroughly rejected *Ibanez* in its denial of its motion for reconsideration, Resp. App. 18a-24a, the Sixth Circuit did not discuss *Ibanez*.

Ibanez is distinguished from the present case by at least four factors: (1) *Ibanez* concerned a consumer "subprime mortgage" case rather than a substantial commercial mortgage where both sides were represented by counsel; (2) the foreclosing mortgagee in *Ibanez* was not in the record chain of title; (3) *Ibanez*

did not address the meaning of "record chain of title" as used in Michigan's foreclosure statute; and (4) *Ibanez* was based on a peculiarity of Massachusetts' common law of mortgages.[10]

III. This case is not the proper vehicle "to send a clear message" to "Too-Big-To-Fail" banks.

Petitioner shrilly urges this Court to "step into this thicket [of mortgage foreclosures]" and "send a clear message" to "Too-Big-To-Fail" banks because "Not enough courts . . . are willing to hold the big banks accountable, including the courts in which [Petitioner] is a party. . . . Mortgagors are the victims of this Wild West." Pet. 13, 26. In reality, the holder of the mortgage note is the subsidiary of a REMIC trust with numerous investors – not a "big bank" – and Petitioner simply wishes to delay foreclosure of a $16,300,000 commercial mortgage loan for as long as possible.

Petitioner has also made numerous misrepresentations and omissions of fact and law, which make this case a poor vehicle for review. Petitioner failed to

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[10] Massachusetts retains the medieval common law "title theory" of mortgages by which title to the property is deemed to have passed from the mortgagor to the mortgagee upon execution of the mortgage. *See Ibanez*, 2011 WL 38071, * 8 (Jan 7, 2011). In contrast, Michigan recognized the more contemporary "lien theory" of mortgages in the 19th century. *See Ladue v. Detroit & M. R. Co.*, 13 Mich 380, 87 Am. Dec 759 (1865).

discuss, or even disclose to this Court, the district court's 17-page opinion and order denying Petitioner's motion for reconsideration, Resp. App. 1a, the Pre-negotiation Agreement, Resp. App. 25a, the title searches that disclosed the chain of title, the district court's review of the original mortgage documents, and the holdings of the Sixth Circuit and the district court that Petitioner lacked standing to question intermediate transfers. Petitioner attempts to mislead this Court on the holding of the Michigan Supreme Court in *Arnold*. Both the district court and the Sixth Circuit referred to Petitioner's arguments as "disingenuous." Pet. App. 12a; Resp. App. 22a, n. 18.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES L. ALLEN
Counsel of Record
LARRY J. SAYLOR
MILLER, CANFIELD, PADDOCK AND STONE, PLC
840 W. Long Lake Road, Suite 200
Troy, MI 48098
248.879.2000
Allenj@millercanfield.com
Counsel for Respondent

February 17, 2011

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LIVONIA PROPERTY HOLDINGS, L.L.C.,

Plaintiff,

V.

12840-12976 FARMINGTON ROAD HOLDINGS, L.L.C.,

Defendant.

Civil No. 10-11589
Hon. John Feikens

OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION [Dkt. 30]

I. INTRODUCTION

Plaintiff seeks reconsideration of this Court's Opinion and Order Denying Plaintiff's Motion for Preliminary Injunction and Dissolving Temporary Restraining Order (Dkt. 24). As Plaintiff correctly notes, to succeed on a motion for reconsideration, the moving party must demonstrate both a palpable defect and that a different disposition of the case will result from a correction of that defect. E.D. Mich. LR 7.1(h)(3). Although Plaintiff asserts certain challenges regarding its likelihood of success on the merits, it fails to challenge the Court's finding that "because Borrower is permitted to redeem after the sale, it has not shown that irreparable harm will occur at the

time of the foreclosure sale." (Dkt. 24 at 24). And, as I noted in my original Order, "a finding that there is no likelihood of irreparable harm . . . is usually fatal." (*Id.* at 8). Thus, regardless of any alleged "palpable defect", Plaintiff has not satisfied the requirements for a motion for reconsideration, and this Motion is therefore denied. Nevertheless, because the factors for granting an injunction must be balanced, I will address the Plaintiff's arguments regarding its likelihood of success.

II. ANALYSIS

Plaintiff raises several purported defects in my original Order: (1) the Court was misled with respect to the record chain of title; (2) the Court improperly found that allegedly-unrecorded-interim assignments do not create a defect in the record chain of title sufficient to prevent foreclosure by advertisement; (3) Defendant has not demonstrated adherence to all contracts providing for the assignment of the Mortgage and Note to each subsequent assignee; (4) Defendant has not demonstrated that the Trust was in existence at the time the Mortgage and Note were assigned to it; and (5) the Court improperly found that Plaintiff lacks standing to challenge the assignments.

First, a note about Plaintiff's standing. Plaintiff, as a mortgagor subject to foreclosure by advertisement, certainly has standing to challenge whether Defendant has complied with the statutory

requirements for that foreclosure. But it does not have standing to go beyond the statutory requirements to inspect each and every aspect of every contract or agreement between any predecessor and successor mortgagee, searching for "irregularities" and noncompliance. As Plaintiff acknowledges,[1] and as I previously explained in great detail, Plaintiff cannot avoid its contractual obligations under the Loan Documents (including the contractual right of foreclose by advertisement contained within the Mortgage) by arguing that the assignments of those documents were invalid or ineffective.[2] Thus, if Defendant has complied with the required statutory mandates and Defendant is the holder of Plaintiff's Note and Mortgage, it has the contractual and statutory right to foreclose by advertisement, and this Court will not enjoin Defendant from doing so.

Foreclosure by advertisement is "a matter of contract, authorized by the mortgagor, and ought not to be hampered by an unreasonably strict construction of the law." *Church & Church, Inc. v. A-1 Carpentry,* 766 N.W.2d 30, 36 (Mich. App. 2008); *National Airport Corp.*, 252 N.W.2d 519, 521 (Mich. App. 1977)

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[1] Plaintiff admits it "does not challenge the underlying obligation." (Pl Mot. for Recons. at 18).

[2] *See* Dkt. 24 at 15 ("Borrower certainly has an interest in avoiding foreclosure But the validity of the assignments does not effect *whether* Borrower owes its obligations, but only to *whom* Borrower is obligated "); *id.* at 17 ("Borrower cannot now step into the shoes of an assignor to assert its contract rights ")

("The power is part of the contract, and should be construed on principles applicable to contracts, and not as a hostile process.") (quoting *Reading v. Waterman,* 8 N.W. 691, 692 (Mich. 1881)). The Michigan Supreme Court has explained that substantial compliance with the statutory requirements for foreclosure by advertisement is all that is required:

> The statutes were intended to prevent surprise or unfairness, and they should be enforced in everything substantial. Courts cannot disregard any of their positive provisions. But on the other hand those provisions cannot be enlarged or unreasonably construed so as to render mortgage sales unsafe, or to make bidding hazardous. The law was designed to encourage and not to destroy recourse to these simple and cheap remedies; and while no substantial right should be disregarded, substantial regularity is all that should be [required].

Reading, 8 N.W. at 692 (emphasis added).

In *Peterson v. Jacobs,* the Michigan Supreme Court addressed whether a defect in the statutory requirements for foreclosure by advertisement rendered a foreclosure sale invalid. In that case, the plaintiff argued that the statute required a foreclosure notice to describe the names of every mortgagor and mortgagee, "irrespective of whether there was a complete and duly recorded reassignment by such assignee, or not." 6 N.W. 2d 533, 535 (Mich. 1942) (emphasis added). The Court found that failure

to mention assignments to and from an interim assignee, who held the mortgage for "some eight months," was not such a substantial irregularity as to render the foreclosure by advertisement void. *Id.* at 535-36.

Plaintiff argues that *Peterson* was decided pursuant to a prior version of the statute, which did not require "a record chain of title." As Plaintiff so aptly notes, however, the then-existing statute did require "a recording of the mortgage, and all assignments." (*See* Pl. Mot. for Recons. at 13 (citing *Feldman v. Equitable Trust Co.*, 278 Mich. 619, 625 (Mich. 1937))). Thus, while the language of the statute has changed, the requirement that the mortgage and assignments be recorded remains the same.[3]

Plaintiff next argues that when the *Peterson* court "announced" the rule that the foreclosure-by-advertisement statute requires only "substantial compliance," it referred only to the foreclosure notice.[4] I do not read *Peterson* so narrowly. The *Peterson* court

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[3] In fact, as Defendant correctly notes, the old language, requiring the recording of "the mortgage and all assignments," is more strict than the current language (applicable to this case), which requires only a record chain of title. And, the Michigan Supreme Court in *Arnold v. DMR Financial Services*, 532 N.W.2d 852 (Mich. 1995) construed M.C L. 600.3204 by relying upon *Feldman, supra*, which considered the predecessor statute. Thus, if the modification to the statute since *Peterson* favors either party, it favors Defendant.

[4] The substantial-compliance rule was "announced" at least as early as 1881, in *Reading*, 8 N W at 692.

based this "announcement" on the general principle that statutory foreclosures are matters of contract that "ought not be hampered by an unreasonable construction of the law." *Id.* at 535. Moreover, because the *Peterson* court considered the need to publish notice of assignments "whether . . . complete and duly recorded . . . or not," its holding implicitly recognizes that (1) mortgages may be validly "assigned" without a "complete and duly recorded" assignment document; and (2) those assignments do not prevent foreclosure by advertisement so long as they do not prevent "substantial compliance" with the statute.[5]

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[5] This is confirmed by the Michigan Supreme Court's later holdings in *Arnold* and *Feldman* (with *Feldman* construing the foreclosure-by-advertisement statute at issue in *Peterson*, and *Arnold* construing the amended statute)

In *Feldman*, the plaintiff, a mortgagor, complained that an unrecorded assignment (for security purposes) of a mortgage invalidated a foreclosure by advertisement The defendant, the mortgagee of record, argued that "the holder of an unrecorded assignment has no right to foreclose by advertisement and that the holder of the record title is the only proper party to institute such proceedings." 270 N.W. at 810. The Court adopted the defendant's reasoning and concluded that "[h]aving determined that the defendant company is the only party having the right to foreclose the mortgage by advertisement, and such foreclosure being regular and in accordance with the statute, the conclusion is inevitable that plaintiffs bill of complaint must be dismissed." *Id.* at 811

And *Arnold* addressed the same question under the successor version of the statute. In that case, again, the plaintiff argued that an unrecorded assignment (for security purposes) prevented foreclosure by advertisement because the statute required that all assignments be recorded. *Arnold*, 532 N.W 2d at 855. The court rejected the plaintiff's reading of the statute

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These implicit findings are consistent with Michigan precedent generally permitting assignments in blank. *See* (Dkt. 24 at 20 (citing authority)); *see also Kurbel v. O'Hair,* 240 N.W. 57 (Mich. 1932) (recognizing the validity of a deed executed in blank; "if the blank were filled up after delivery, the grantor, if he claimed the benefit of accompanying and related contracts, would thereby make the deed as completed his own, and preclude himself from objecting to the invalidity afterwards.") (quoting *Lockwood v. Bassett,* 14 N.W. 492, 493 (Mich. 1883)).

But the strict rule urged by Plaintiff – that every assignment of a mortgage must occur pursuant to an executed assignment document, naming the assignee at the time of execution, and thereafter recorded – would effectively prohibit all assignments in blank. Indeed, blank assignments are, by definition, not recorded and not recordable.[6] Under Plaintiff's reading,

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and adopted the *Feldman* reasoning: "we hold again, that [the foreclosure by advertisement statute] provided that only the record holder of the mortgage could foreclose by advertisement, and the mortgagor was not affected by the fact that others had an unrecorded interest in the mortgage." *Id.* at 856

Similarly here, the Defendant, as record holder of the mortgage, is the only party that may foreclose by advertisement The Plaintiff is unaffected by any other unrecorded interests (which may or may not have existed) in the mortgage

[6] Plaintiff asserts, without authority, that "Assignments of mortgages in blank ... are prohibited in Michigan as they violate the Michigan recording statute . in failing to identify the grantee and lack present intent." (Pl Mot. for Recons. at 8-9 n 7). Although an assignment of a mortgage in blank cannot be

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however, even after the blanks are filled in, and the assignment recorded to perfect an interest in the record chain of title, the assignee has not established his right to foreclose by advertisement because there could have been an interim holder of the blank assignment that did not record an entry in the chain of title. And, under Plaintiff's purported rule, a mortgagor attempting to avoid foreclosure by advertisement – a remedy to which he agreed by contract – could impose great expense and delay in the foreclosure process by alleging that the record-holder of the mortgage must prove the non-existence of interim holders of any assignments in blank (something the statute, itself, does not require). As the Michigan Supreme Court acknowledged, however, the foreclosure-by-advertisement statute "was designed to encourage and not to destroy recourse to these simple and cheap remedies." *Reading,* 8 N.W. at 692. It would be "perfectly useless and serve no good purpose" for interim holders of assignments in blank to

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recorded, it does not follow that it is "prohibited" in Michigan. Once the blanks have been completed, as the law permits, the assignment can be properly recorded and will then (and only then) establish notice of the listed assignee's interest in the chain of title The holder of an assignment in blank thus assumes some risk that an intervening party could record a superior interest in the chain of title during any period that the assignment remains "in blank" and unrecorded. *See Church & Church, Inc.,* 766 N.W 2d at 39 (explaining that Michigan's race-notice statute, which provides that any conveyance of real estate that is not recorded is void as against a subsequent purchaser in good faith, applies to mortgages).

execute and record separate assignment documents "unless such legal formalism is mandatory." *Peterson*, 6 N.W.2d at 536. I do not find that the law requires such formalism.

The substantial-compliance rule is also consistent with the purpose of the recording laws: "that the true state of the title be represented . . . in the public records . . . [and further] to protect an innocent purchaser." *See Harr v. Coolbaugh*, 59 N.W.2d 134 (Mich. 1953). The foreclosure by advertisement statute requires a "record chain of title . . . evidencing the assignment of the mortgage to the party foreclosing the mortgage." M.C.L. 600.3204(3). The same statute also requires that the foreclosing party hold the original note. M.C.L. 600.3204(1). These rules permit only the party who holds the note and is record holder of the mortgage, with a record chain of title traceable to the original holder, to foreclose by advertisement. They also ensure that the mortgagor has notice of the party that is claiming that right (i.e., only the record holder of the mortgage).

Here, the Plaintiff acknowledges that a record chain of title exists evidencing transfers from the original mortgage holder (Lehman Brothers) to the Trust, and from the Trust to the current lender (Defendant). There are no unaccounted for or broken "links" in this chain. And, unlike many of the cases on

which Plaintiff relies,[7] the foreclosure by advertisement in this case was not initiated by someone outside the chain of title. Plaintiff, however, is unsatisfied with the record chain of title; instead it purports to challenge whether other assignment documents do or should exist, and if so, whether they must be recorded. There is no evidence that other assignments were executed, rather than that the original assignment was executed in blank, transferred in blank to each subsequent assignee (whomever those entities may be), and ultimately (approximately one month later) that the Trust affixed its name as the assignee and recorded the assignment to place all the world (including Plaintiff) on notice of its claim. Because Defendant has established a record chain of title from the original lender to it, it has substantially – if not completely – complied with the statutory requirements. Whether some interim assignee held an assignment in blank or any other unrecorded document does not alter or otherwise cloud the unbroken record chain of title in this case. In these circumstances, Plaintiff cannot credibly argue that it (or anyone else) will suffer "surprise or unfairness" if the foreclosure by advertisement proceeds. *See Reading*, 8 N.W. at 692.

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[7] In fact, almost every case upon which Plaintiff relies, including *Ibanez* (discussed extensively below) involves a foreclosure by advertisement initiated (and in some cases, completed) by a party that was not the record holder of the mortgage at the time the foreclosure was initiated.

Plaintiff also raises several arguments relating to whether the Court was misled about certain transfers of the Loan Documents. Among them, Plaintiff argues that the Court does not have "competent evidence" of the PSA or certain contracts between Lehman Brothers and LBHI. And, according to Plaintiff, the Court was misled as to whether SASC or SASC II was the proper party to the PSA, and whether that party (as depositor to the Trust) ever held the Note or Mortgage. Plaintiff also argues that the Trust was not in existence when the assignment to it was executed. According to Plaintiff, these "irregularities" alter or otherwise cast doubt on the "record chain of title." But the record chain of title is just that – the record chain of title.[8] The record chain of title demonstrates that Lehman Brothers assigned the Mortgage – directly or indirectly – to the Trust; and the Trust assigned the Mortgage – directly or indirectly – to the Defendant. The record does not suggest that some other entity claims (or may claim) an interest in the

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[8] Plaintiff has identified no authority suggesting that a record chain of title includes unrecorded documents By definition, the record chain of title is comprised of documents that were filed in the County Register of Deeds' office

By way of example only, Plaintiff claims that Defendant's representation that the "record chain of title consisted of an Assignment from Lehman Brothers, FSB to the LB-UBS Commercial Mortgage Trust 2005-CI, (the "Trust") and then from the Trust to the Defendant" is "untrue " On the contrary, that is exactly what the record chain of title consists of – nothing more.

Mortgage.[9] And as discussed extensively in the original Order, the parties to any assignments appear to have ratified or otherwise acquiesced to the transfers and are not challenging them here or attempting to assert any rights in the Loan Documents. Moreover, as discussed below, by virtue of the fact that Defendant is the holder of the Note, it also holds the Mortgage by operation of law. Finally, regardless of what contracts exist between which entities, Plaintiff was not and is not a party to any of those contracts (including the assignments), and lacks standing to challenge their validity or the parties' compliance with those contracts here.

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[9] In another case cited by Plaintiff, the Michigan Supreme Court explained that "it is the plain intent of [the foreclosure by advertisement] statute that it is a condition precedent to the right to foreclosure by advertisement that the title of an assignee of a mortgage appear of record, and of record in such a manner that evidence extraneous to the record will not be needed to put it beyond reasonable question." *Feldman v. Equitable Trust Co.*, 278 Mich. 619, 625 (Mich. 1937). In this case, without consideration of extrinsic evidence, the record identifies Defendant as the current assignee of the Mortgage. It is only by inspecting extrinsic evidence that Plaintiff can cast "doubt" on the record chain of title by suggesting that there were, in fact, other entities that held an assignment in blank before it was completed and recorded. The statute did not create a system inviting mortgagors to delve into the business dealings of their lenders to determine their compliance with all of their contractual obligations. It offers certain protections to mortgagors, sufficient to ensure they are not at risk of competing claims. And, it offers certain protections to purchasers at a foreclosure sale so that they may purchase a clean title. Those protections are satisfied in this case.

Although it is not binding precedent, the Bankruptcy Court for the District of Massachusetts was faced with many similar arguments in *In re Almeida*, 417 B.R. 140 (Bankr. D. Mass. 2009), which addressed a trust's standing to obtain relief from the automatic stay in order to foreclose a mortgage.[10] In that case, the trust established that it was the holder of the original note and mortgage. *Id.* at 142-43. But a third party claimed that the trust nevertheless lacked standing for relief from the stay because the note was not properly negotiated, and "mere possession of a mortgage does not grant the possessor any rights under the mortgage, such as the right to foreclose it." *Id.* at 147-148. The third party also claimed that the assignment of the mortgage was invalid because it failed to comply with certain terms of a Pooling and Servicing Agreement (PSA), which the third party claimed required the mortgage to be assigned to an interim entity (defined as the Depositor in the PSA) before being assigned to the trust. *Id.* at 148. And finally, the third party challenged the timing of some of the assignment transactions. *Id.*

The *Almeida* court first acknowledged the assignee's possession of the note, and the validity of assignments in blank, in general.[11] *Id.* at 148-49. As

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[10] The challenges to the trust's standing to obtain relief from stay in *Almeida* were similar to Plaintiff's challenges to the Defendant's standing to foreclose by advertisement.

[11] Notably, although both *Almeida* and *Ibanez*, *infra*, are Massachusetts decisions, *Almeida* suggests that assignments of

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the holder of the note, the trust had standing to seek payment thereof. *Id.* at 149. The court then explained that, to the extent that the assignment was made without actual authority, that defect was remedied through the assignor's ratification or acquiescence. *Id.* Finally, the court addressed the argument regarding the alleged "invalidity of the Mortgage Assignments because there was no interim assignment of the Mortgage to [the interim depositor entity]:"

> A failure to follow this protocol – such as by direct assignment of the mortgage from the loan originator to the pool trustee, bypassing the depositor – would, the Debtor contends, constitute a breach of the PSA. . . . The Debtor argues that because the Confirmatory Assignment is a direct assignment from [the original holder] to [the trust] that bypasses the depositor, it must be invalid. This argument falls far short of its goal. Even if this direct assignment were somehow violative of the PSA, giving rise to unfavorable tax, regulatory, contractual, and tort consequences, neither the PSA nor those consequences would render the assignment itself invalid.

Id. at 149 (emphasis added) (quoting *In re Samuels*, 415 B.R. 8, 22-23 (Banks. D. Mass. 2009)). The court

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blank are valid in Massachusetts, while *Ibanez* reaches the opposite conclusion. This distinction is irrelevant here because Michigan permits assignments in blank.

also noted that the third party lacked standing to challenge the validity of the assignments:

> [The third-party] is not a third party beneficiary of the PSA, and, ironically, he would appear to lack standing to object to any breaches of the terms of the PSA. It would appear to this Court that the investors who bought securities based upon the pooled mortgages would be the parties with standing to object to any defects in those mortgages resulting from any failure to abide by the express provisions of the PSA.

Id. at 149 n. 4 (emphasis added). Ultimately, the court found the direct assignment from the original holder to the trust, bypassing assignment to the depositor, "was sufficient to confer standing" to the trust to seek relief from the automatic stay. *Id.* at 150.

I am persuaded by the court's analysis in *Almeida*. Just as in that case, the Defendant here has established that it is the holder of the original Note and Mortgage. And, just as in *Almeida*, the Plaintiff here lacks standing to assert any breaches in the terms of any contracts between the assigning entities. (Dkt. 24 at 15-18 (discussing Plaintiff's lack of standing to challenge validity of contracts to which it is not a party)). Moreover, any purported breaches in those contracts would not render the assignments themselves (which are separate contracts) void. And by transferring the original Loan Documents, including the Note, Mortgage, and all Assignments, all

assigning entities appear to have ratified any alleged breaches in the terms of those contracts.

Plaintiff next suggests that because the right to foreclose by advertisement is contractual, "unequivocally, the Defendant must establish that there is a valid contract for each link in the chain of title that ultimately resulted in the Defendant 'owning' the Note and Mortgage." (Pl. Mot. for Recons. at 11; *see also id.* at 8 n. 6 ("Defendant . . . must show how the right [to foreclose by advertisement] contractually passed from entity to entity.")). First, I note that this argument is simply Plaintiff's most recent attempt to challenge the validity of the assignments and avoid its obligations under the Mortgage by claiming that the power of sale contained in the Mortgage may not be enforced by Defendant. Plaintiff cleverly argues that it is not attempting to avoid its obligations, but instead is challenging Defendant's standing to foreclose by advertisement. But, Plaintiff's arguments reach far beyond challenging Defendant's compliance with the statutory mandates, and extend into analyzing whether there are "valid contract[s] for each link in the chain of title" and whether the parties to those contracts complied specifically with their terms. In other words, Plaintiff seeks to challenge whether each and every entity that ever held an interest in Plaintiff's Note and Mortgage complied to the letter with the terms of each and every contract between it and its successor. These are <u>exactly</u> the types of challenges that Plaintiff, as a stranger to those contracts, lacks standing to assert. Plaintiff, a mortgagor,

contractually agreed to permit its mortgagee to foreclose by advertisement. For all of the reasons articulated in the original Order, and the reasons contained herein, Defendant appears to be the holder of Plaintiff's Mortgage.[12] So long as Defendant complies with its statutory obligations, and it appears to have so complied, it (and only it) may foreclose by advertisement.

Moreover, Plaintiff has cited no authority purporting to require a entity foreclosing by advertisement to prove the validity of and conformance with the underlying contracts pursuant to which assignments of the loan documents were executed, nor have I identified any such authority. By its terms, the foreclosure-by-advertisement statute does not require a foreclosing party to conclusively establish a valid contract for each link in the title; it requires only a record chain of title. As discussed, the statute provides protections allowing a mortgagor to ensure that any party foreclosing by advertisement possesses the original Note, and has (at the time it initiates the foreclosure proceedings) a recorded interest traceable

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[12] Those reasons include, but are not limited to, Defendant is the holder of the indebtedness; each predecessor holder of the mortgage transferred the original Loan Documents to Defendant; each predecessor holder appears to have ratified or adopted the transfers, thus curing any breaches in underlying contracts; and Plaintiff may be barred from challenging Defendant's right to enforce the mortgage (and its contractual power to foreclose by advertisement) by laches, estoppel, waiver, and/or ratification.

to the original mortgage holder. The Defendant here has satisfied those requirements.

I will close by addressing Plaintiff's reliance on *U.S. Bank Nat'l Assoc. v. Ibanez,* No. 08-Misc-384283, 2009 WL 3297551 (Mass. Land Ct. Oct. 14, 2009). According to Plaintiff, although not binding, *Ibanez* "provides an excellent analysis and guidance of some of the issues in this case." (Pl. Mot. for Recons. at 15). That decision, which has resulted in considerable commentary, currently is on appeal directly to the Massachusetts Supreme Judicial Court, scheduled for argument in September.

In *Ibanez,* as relevant here, the Massachusetts Land Court considered the following question: "did the plaintiff [bank] have 'the right . . . to foreclose the subject mortgage in light of the fact that the assignment of the foreclosed mortgage into the [bank] was *not executed or recorded* until *after* the exercise of the power of sale.'" *Ibanez,* 2009 WL 3297551 at *1 (emphasis and omission in original). Specifically, the bank did not obtain or record an assignment of the subject mortgage until fourteen months after the foreclosure sale was concluded.[13] *Id.* at *2 n. 9. At the time of the foreclosure sale, the bank possessed the original note and mortgage, each endorsed in blank.

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[13] Massachusetts law differs from Michigan law in that it "requires that a foreclosing party have a valid assignment of the mortgage at the time of notice and sale, but it does not require the assignment to be 'of record' at that time." *Id.* at *1 n. 7

Id. at *2. As Plaintiff explains, as in this case, those blank-endorsed documents changed hands multiple times before the foreclosing bank obtained them;[14] each transfer occurred without appearing in the public record.[15] *Id.* at *5. The court inspected the underlying contracts providing for the assignment of the loan documents and determined that some terms of those contracts appeared to have been breached by the parties thereto. Specifically, the agreements required that the mortgage assignment to the bank be "in recordable form at the time the loans were transferred." *Id.* at *8. According to Plaintiff, the court found that because only blank assignments were transferred, "in reality, the mortgages themselves were thus still held by the Originator." (Pl. Mot. for Recons. at 16). And, Plaintiff claims, the court found that because the power to foreclose by advertisement is contractual, the violation of the terms of the contract prevented the foreclosure. (*Id.* at 16-17).

But, a closer inspection of the *Ibanez* opinion reveals that the court's holding was based on a very different analysis. Specifically, the court found that

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[14] Plaintiff is quick to point out that several of the entities involved in this case were also involved in the mortgage transfers in *Ibanez*. The similarity of parties is not relevant to the analysis of this case.

[15] And, as in this case, the interim transfers occurred by virtue of the transfer of the blank-endorsed documents (i.e. without separate assignment documents being executed for each assignment).

"since the blank mortgage assignments failed to name an assignee, they were ineffective to transfer any interest in the mortgage." *Ibanez*, 2009 WL 3297551 at *5. "This is so," it explained, "because Massachusetts follows the 'title theory' of mortgages, making them a type of deed." *Id.* at *5 n. 27. "Under [Massachusetts'] title theory of mortgages, a mortgage of real estate is a conveyance of the title or of some interest therein defensible upon the payment of money or the performance of some other condition. Literally, in Massachusetts, the granting of a mortgage vests title in the mortgage to the land placed as security for the underlying debt." *Id.* (quoting *Faneuil Investors Group, L.P. v. Bd. of Selectmen of Dennis*, 75 Mass. App. Ct. 260, 264-65 (2009)). Thus, although the bank held the blank-endorsed documents and could enforce the note as "bearer paper", "since the blank mortgage assignment was ineffective, the mortgage remained with [the originator]." *Id.* at *6. And, accordingly, although the court did find that the terms of the contracts providing for assignments required the assignments to be in recordable form, it was the fact that blank assignments are ineffective in Massachusetts – not the fact that they breached the terms of the contracts – that invalidated the assignments. *Id.* at *8 (explaining that the only mortgage assignment executed was "the ineffective blank mortgage assignment", thus the note was held by the bank but the mortgage securing that note was still held by the originator).

The *Ibanez* court also analyzed the question of whether the bank should be deemed the "present holder of the mortgage" by virtue of the fact that it was the present holder of the note and blank mortgage assignments. *Id.* at *10. The court rejected this argument for two reasons: (1) "the blank mortgage assignments they possessed transferred nothing" under Massachusetts law (applying analysis regarding the title-theory of mortgages discussed above); and (2) in Massachusetts, "even a valid transfer of the note does not automatically transfer the mortgage. The holder of the mortgage and the holder of the note may be different persons." *Id.* at *11 (citation and internal quotation omitted). Notably, even the *Ibanez* court recognized that an assignment to the bank from the last assignee of record would be sufficient – without the necessity to obtain or record assignments for each interim transfer. *Id.* at *11 n. 48.[16]

I decline to adopt the reasoning of *Ibanez* because the Massachusetts law on which it relies differs from Michigan law in two important aspects.[17] First, unlike

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[16] Of course, if another assignment was recorded before the bank recorded its assignment, the bank's assignment would again be outside the record chain of title, and the bank would need to obtain an assignment from the *new* assignee of record. *Id.* at *11 n. 48

[17] I also believe the Massachusetts court erred in inspecting the underlying contracts, and any purported breaches in them, where no parties thereto were challenging their validity or effect. But, as explained above, the court's holding did not turn on that analysis so it does not form a basis for my decision here.

Massachusetts, Michigan does not follow the "title theory of mortgages." "Under Michigan law, a mortgage is not an estate in land, it is a lien on real property intended to secure performance or payment of an obligation." *Prime Financial Services v. Vinton*, 761 N.W.2d 694, 703 (Mich. App. 2008) (internal citations omitted); *see also Equitable Trust Co. v. Milton Realty Co.*, 249 N.W. 30, 31 (Mich. 1933) ("A real estate mortgage in this state is but a security, in the nature of a specific lien, for the debt.") (internal quotation and citation omitted). Second, unlike in Massachusetts, in Michigan, a mortgage cannot exist separately from the underlying note. *Prime Financial*, 761 N.W.2d at 703. "A mortgage is a mere security interest incident to an underlying obligation, and the transfer of a note necessarily includes a transfer of the mortgage with it. For the same reason, a transfer of a mortgage without the underlying obligation 'is a mere nullity.'"[18] *Id.* (citing *Ginsburg v. Capital City*

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[18] Plaintiff, in fact, recognized this Michigan doctrine in its original Motion for a Preliminary Injunction (Pl. Mot. for Prelim Inj. at 10) ("the decisive weight of authority . . holds that an assignment of a mortgage without the underlying debt is a nullity, and therefore unenforceable. A security interest cannot exist, much less be transferred, independent from the obligation which it secures The security interest follows the debt . . If the debt is not transferred, neither is the security interest.") (internal citations omitted). Thus, because Plaintiff plainly understands that, unlike Massachusetts law, Michigan law does not permit a note and mortgage to be held by different parties, I find Plaintiff's reliance on *Ibanez* – and Plaintiff's misrepresentation of the legal basis on which *Ibanez* was decided – to be disingenuous at best.

Wrecking Co., 2. N.W.2d 892 (Mich. 1942));. Thus, when an assignee takes ownership of a note, the underlying mortgage transfers to it by operation of law. *Id.* at 710; *see also id. at* 704 (explaining that, in Michigan, the interests in a mortgage are ascertained by determining whether and to what extent an assignor grants its interest in a note); *Equitable Trust Co,* 249 N.W. at 31 ("A transfer or assignment of the obligation operates as an assignment of the mortgage.") (citation omitted).

Accordingly, under Michigan law, unlike in *Ibanez,* even if the assignment in blank of the mortgage was ineffective – and I do not believe it was – because Defendant possesses the Note, the Mortgage incident to that Note transferred to Defendant by operation of law.[19]

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[19] Plaintiff makes a last-ditch effort to save its argument by suggesting that the various contracts assigning the notes and mortgages to subsequent mortgagees may have reserved rights in the original Note holder, or may have lacked consideration, or may not have been valid under the laws of the State governing those contracts. (Pl. Mot for Recons. at 7). Plaintiff cites the Restatement 3d of Property· Mortgages § 5 4 for the proposition that a transfer of a note "also transfers the mortgage unless the parties to the transfer agree otherwise" (*Id* at 7 n 4 & Ex 12 thereto (emphasis added)). But, Plaintiff has cited no binding authority contradicting the Michigan doctrine that a transfer of a note transfers the mortgage by operation of law – without regard to any "agree[ment] otherwise." And, because Defendant is therefore the assignee of the Mortgage, the remaining arguments also fail. Even if this issue was not dispositive as to Defendant's standing to foreclose by advertisement, as discussed, Plaintiff lacks standing to challenge whether the underlying contracts were valid under the law or lacked consideration. Plaintiff cannot circumvent its need for standing by

(Continued on following page)

And, notwithstanding all of Plaintiff's arguments regarding breaches of contracts, incorrectly-named parties, and "irregularities" in assignment documents, just as Defendant is entitled to collect the debt, it is entitled to enforce the other provisions of the Mortgage – including the power of sale.

II. CONCLUSION

Defendant is the holder of the Note, and the record holder of the Mortgage with a record chain of title traceable back to the original mortgagee. As such, as explained in my prior Order, Plaintiff cannot establish a likelihood of success on its claims. Moreover, Plaintiff has not challenged my previous finding that it cannot establish a likelihood of irreparable harm. Therefore, I now confirm my finding that Plaintiff is not entitled to a preliminary injunction. Plaintiff's Motion for Reconsideration is DENIED.

IT IS SO ORDERED.

Date: June 14, 2010

s/ John Feikens
John Feikens
United States
District Judge

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couching its argument as an objection to Defendant's standing; Defendant holds the Note, has satisfied the statutory requirement to establish a record chain of title, and is the assignee of the Mortgage.

APPENDIX B

CWCapital
ASSET MANAGEMENT

December 22nd, 2009

VIA EMAIL

Livonia Properties Holdings, L.L.C
36700 Grand River Avenue
Farmington Hills, MI 48335
Attn: David Clapper

RE: That certain loan in the original principal amount of $16,300,000 as evidenced by a Promissory Note dated December 30th, 2004 (the "Note") executed by LIVONIA PROPERTIES HOLDINGS L.L.C. ("Original Borrower") and made payable to LEHMAN BORTHERS BANK, FSB,, (together with its successors and assigns, "Lender"), which Note is currently held by Bank of America, NA. as successor by merger to LaSalle Bank National Association as Trustee for the registered holders of LB-UBS Commercial Mortgage Trust 2005-C1, Commercial Mortgage Pass-Through Certificates, Series 2005-C1 ("Holder"), (The Note and all other documents executed in connection with the Note shall be collectively referred to as the "Loan Documents")

Dear Mr. Clapper:

I write on behalf of CWCapital Asset Management LLC ("CWCAM"), solely in its capacity as Special Servicer on behalf of Holder.

Borrower desires to engage in discussions with Holder relating to the obligations it owes to Holder and wants to discuss various courses of actions which may be in the party's mutual interests. Holder is agreeable to participate in such discussions provided that Holder and Borrower enter into this Agreement to mutually acknowledge the nature of, and certain understandings with respect to, the proposed discussions. This letter constitutes an agreement between Holder and the Borrower with respect to negotiations concerning the Loan and the Loan Documents; accordingly, for good and valuable consideration, Holder and Borrower agree as follows.

1. Negotiations. The parties to this letter agreement acknowledge that they are about to commence negotiations (the "Negotiations") concerning the obligations owed to Holder by the Borrower and that they intend to discuss various courses of action which will include those that they believe may be in their mutual interests, with a view to a compromise and settlement by the parties. Accordingly, the parties expressly stipulate and agree that both the content and the existence of statements and communications among the parties created during such Negotiations shall remain protected and no part of any oral or written communication from Holder during such Negotiations shall be admissible or subject to discovery in any case or proceedings or be used for any other purpose, including, without limitation, proof of admissions of liability; provided, however, that this paragraph shall not pertain to information which in the absence of this

letter agreement would be available for inspection or review by Holder pursuant to the Loan Documents.

The Borrower agrees to provide the following documents as soon as reasonably possible:

1. Financial statements Year-End 2007, 2008 and YTD 2009 to include cash flow, income statement and balance sheet
2. Current Rent Roll
3. 2008 and 2009 (or 2010, if available) Budgeted CAM/Tax Reconciliations (if available)
4. Market information (competitors)
5. Marketing plan.
6. 2010 Operating Budget.
7. 12 month cash flow projections.
8. Capital expenditures scheduled in the next 12 months and completed in last 24 months
9. List of third party contracts including vendor contact information.
10. Most recent aged Accounts Payable and Receivable reports.
11. Detailed workout plan
12. Valid Certificate of insurance

2. Agreements to be Writing. This letter agreement will confirm that, while there may be many matters which the parties hope to discuss, no agreement reached with respect to any matter (including, without limitation, any waiver of any right or remedy)

shall have any effect whatsoever unless such agreement is reduced to writing, signed and delivered by all parties' authorized representatives. This letter agreement may be amended only by a written agreement signed by and delivered by all parties' authorized representatives. No officer or employee is authorized to commit Holder verbally to any agreement, or to any modification of the existing Loan Documents, and Borrower may not rely on any verbal communication or anything else from Holder or any of its officers or employees which may be construed to the contrary.

3. The Loan Documents in Force. The Loan Documents are in full force and effect and are binding on the Borrower in accordance with their terms. The Borrower shall continue to be bound to their terms, except only to the extent that such Loan Documents may hereafter be modified by a written agreement duly signed and delivered as described in paragraph 2, above. This Agreement shall not be construed as an amendment, novation, accord and satisfaction, estoppel, or waiver of Holder's rights under the Loan Documents. Nothing contained herein shall limit Holder in initiating, continuing or otherwise proceeding to exercise any right or remedy available to Holder under the Loan Documents or otherwise.

4. Status of Obligations. Notwithstanding the commencement or continuation of discussions or negotiations, Holder has not and does not waive the existence of any events of default under the Loan Documents or any rights and remedies that Holder

may have. Holder shall not be limited or restricted from enforcing any rights or remedies available to it, including, without limitation, commencing judicial or non-judicial foreclosure proceedings, seeking the appointment of a receiver, collecting rents and profits or otherwise exercising its remedies, and Holder expressly reserves all such rights and remedies. Borrower hereby acknowledges and agrees that there have been no modifications to the Loan Documents and the Loan Documents constitute all of the agreements among Holder and Borrower and the Loan Documents continue to constitute Borrower's legal and enforceable obligations. Borrower acknowledges and agrees that no fiduciary or special relationship with Holder is created by this document, the participation of Holder in any of the Negotiations herein contemplated, or otherwise. Borrower specifically acknowledges and agrees that Holder has made no promise, commitment, or representation whatsoever, nor has Holder any obligation to Borrower to modify the terms of the Loan, offer any discounted payoff of the Loan, refinance the Loan, grant any forbearances, extend the payment terms of the Loan or extend any other financial accommodation to Borrower.

5. Authorized Representatives. Each of the parties will designate in writing who is his, her or its representative for the Negotiations. The persons whose names, addresses and telephone numbers are listed on Exhibit "A" attached hereto have been designated as such representatives as of the date of this letter agreement. Any party hereto may, by notice to the

other, designate additional or substitute representatives. The individuals who sign this letter agreement on Holder's behalf and those who conduct the Negotiations on Holder's behalf do not have the authority to bind Holder to any amendment or modification of or changes in the Loan Documents or to any waiver or release of, or relief concerning, any provision thereof or any default of or requirement applicable to Borrower thereunder or any right or remedy of Holder thereunder. If any of such individuals agree (orally or otherwise), or conclude that it may be appropriate to agree, with Borrower concerning any proposed modification to or amendment of any of the Loan Documents or any modification of any of the obligations thereunder (the "Obligations"), they will summarize that proposed agreement in a non-binding letter of intent ("Letter of Intent") which, when approved in writing by Borrower, will provide the basis for their recommendation to the appropriate senior management of Holder that such a loan modification be authorized by Holder. If such authorization is granted, Borrower will be notified in writing (such notice is referred to herein as an "Authorization Notice"), and only after such notification and full, strict, and timely compliance by Borrower with all of the requirements, terms, and conditions of the Letter of Intent and the Authorization Notice (including, without limitation, the execution and delivery of Borrower and Holder of a definitive, formal written agreement prepared and signed by Holder that expressly amends or modifies one or more Loan Documents or Obligations) will any

modification of any of the Loan Documents or Obligations be binding on Holder.

6. Alternative Opportunities. Since the parties recognize that these Negotiations may not produce a mutually acceptable resolution of the overall problem, Borrower must be and is responsible for operating its business in a manner it deems appropriate. In particular, Borrower should not forego acceptable alternative opportunities, if any, while such Negotiations are pending, including without limitation, any refinancing, sale, lease or other disposition of the underlying real estate collateral, and in each case, subject to the terms of the Loan Documents. Borrower acknowledges that it may not in any way rely on, or claim reliance on, the Negotiations.

7. Tolling of Statutes of Limitations. The parties agree that the running of all statutes of limitations or doctrine of laches applicable to any claims or causes of action, including without limitation, all avoidance actions under Chapter 5 of Title 11 of the United States Code, or applicable state fraudulent conveyance statutes that might be brought by or on behalf of Holder in a proceeding under said Title 11 or under applicable law, are tolled and suspended during the period commencing as of the transmission date of this letter agreement and ending thirty (30) days following receipt of notice terminating the Negotiations described in this letter agreement.

8. Termination. Any party shall have the right to terminate the Negotiations at any time upon written

notice to the other party, without obligation or liability by virtue of the commencement or termination of Negotiations hereunder or the passage of time associated therewith and upon such termination, the parties' respective obligations to one another shall be only as set forth in the Loan Documents, except that the provisions of this letter agreement shall survive.

9. Notice. All notices given hereunder shall be in writing and sent by certified or registered mail, return receipt requested, by overnight courier service or by facsimile with proper confirmation, to the other parties' authorized representative.

10. Payment Statements. From time to time, Holder has sent and may send to the Borrower payment statements. The payment statements are generated for the Borrower's information and convenience only, and the billing statements do not waive, amend or alter the Borrower's obligations under the Loan Documents.

11. Expense Reimbursement. In addition to Borrower's reimbursement obligations in the Loan Documents, Borrower agrees to reimburse CWCAM for all of its out-of-pocket expenses incurred in pursuit of these discussions and negotiations, including, without limitation, attorneys' fees and costs. property inspection costs, appraisal fees, engineering fees, title and housing violation search costs, and costs of obtaining certified rent rolls. Payment of some or all of such out-of-pocket expenses may be required in advance as a condition to proceeding with discussions.

12. Borrower Cooperation. Borrower will cooperate with Holder, its agents and its representatives, to allow Holder to conduct environmental site assessments, site inspections, structural studies, audits, appraisals and other evaluations of the property encumbered by the Loan. Furthermore, Borrower agrees to furnish Holder, upon request and in a form acceptable to Holder, with current, complete and accurate financial statements for Borrower, and with current operating statements and balance sheets for the operation of the real property securing the Loan. All such information must be signed by the person submitting it and certified as true, correct and complete and shall not be subject to the confidentiality provisions of Paragraph 1 of this letter agreement.

13. Rents and Profits as Cash Collateral. Borrower and each of its general partners or managing members hereby agree(s) and acknowledge(s) that the rents, income, revenues, accounts, receipts, issues, and profits, and other payments, whether now existing or hereafter arising under or generated by the collateral securing the Loan ("Rents and Profits") are and shall be deemed a part of Holder's "Cash Collateral" under Section 363 of Title 11 of the United States Code, as amended (the "Bankruptcy Code") in the event that Borrower files a voluntary petition in bankruptcy or is made subject to any involuntary bankruptcy proceeding. Borrower may not use Cash Collateral without the consent of Holder and/or an order of any bankruptcy court, pursuant to Section 363(b)(2) of the Bankruptcy Code, and Borrower

hereby waives any right it may have to assert that Holder's security interest in the Rents and Profits does not constitute Cash Collateral. No consent by Holder to the use of Cash Collateral by Borrower shall be deemed to constitute Holder's approval of the purpose for which such Cash Collateral was expended. Borrower further agrees that if it is determined that any of the rights granted Holder pursuant to the Loan Documents constitute a security interest in or lien against the Rents and Profits, such shall be deemed perfected, "choate," and enforced, without the necessity of making any demand, filing any documents or commencing any proceeding that may otherwise be required under non-bankruptcy law for the perfection or enforcement of security interests, with such perfection and enforcement being binding upon Borrower and any subsequently appointed trustee in any case under the Bankruptcy Code.

14. Voluntary Agreement. Borrower represents and warrants to Holder that Borrower is represented by legal counsel of its choice, that it has consulted with such counsel regarding this letter agreement, that it is fully aware of the terms and provisions contained herein and of their effect, and that it has voluntarily and without coercion or duress of any kind entered into this Agreement.

15. No Claims Against Holder. Borrower acknowledges and agrees that it currently holds no claim against Holder, including, but not limited to, setoff, recoupment, estoppel, waiver, cancellation of instruments, rescission, novation or excuse of performance

under the Loan Documents by virtue of any action(s) or inaction(s) of Holder or any of its predecessors-in-interest, if any.

16. Miscellaneous. This letter agreement shall inure to the benefit of, and be binding upon, the parties hereto and their respective heirs, successors and assigns, and shall be governed by, an interpreted in accordance with, the laws of the State of Michigan. Paragraph headings used in this letter agreement are for convenience only and shall not be used to interpret any term hereof. This letter agreement may be executed in one or more counterparts, each of which shall constitute an original and all of which taken together shall constitute one agreement. Each person executing this letter agreement on behalf of a party represents to the other party that such person has the full authority and legal power to do so. The parties hereto agree that their electronically transmitted signatures on this letter agreement shall have the same effect as manually transmitted signatures.

Should you have any questions, please contact myself or Kinnery Ardeshna. I can be reached directly at 202-715-9555 or via email at dsmith@cwcapital.com

and Kinnery can be reached directly at 202-715-9582 or via email at kardeshna@cwcapital.com.

Sincerely,

Bank of America, N.A. as successor by merger to LaSalle Bank National Association as Trustee for the registered holders of LB-UBS Commercial Mortgage Trust 2005-C1, Commercial Mortgage Pass-Through Certificates, Series 2005-C1

CWCapital Asset Management LLC, solely in its capacity as Special Servicer for Holder

/s/ David H. Smith
By: Name: David H. Smith
Title: Vice President

Consented and agreed to this 7 day of January, 2010

By: LIVONIA PROPERTIES HOLDINGS, L.L.C
A Michigan limited liability company

By: Atlantic XV Manager, Inc,
A Michigan corporation, its Manager

/s/ D M Clapper
Name: David M. Clapper
Title: President

cc: _____
_____
_____
_____

GUARANTOR'S ACKNOWLEDGMENT

By Guarantor's signature below, Guarantor consents to the terms of this letter agreement and acknowledges that this letter agreement does not alter, amend, diminish, waive or discharge the Borrower's obligations to Holder under the Loan Documents in any way. Guarantor further agrees that this letter agreement does not alter, amend, diminish, waive or discharge Guarantor's obligations to Holder under any indemnity, and Guarantor agrees to continue to be bound under the terms of the indemnity in the event that the Loan Documents are modified as provided in Paragraph 5 of this Letter Agreement, without further notice or consent. To the extent that notice and/or Guarantor's consent may be required as a condition precedent to continued liability under any indemnity, such notice and consent are hereby waived. Guarantor agrees that it is bound and shall continue to be bound to Holder under its indemnity during the course of the Negotiations and following any termination of the letter agreement.

Consented and agreed to this ___ day of _____

By: GUARANTOR:

By: /s/ D M Clapper
Name: David M. Clapper,
an individual

EXHIBIT "A"

Schedule of Representatives

The authorized representatives of the parties are as follows:

Holder's Representatives:

Name: Dave Smith
Address: CWCapital Asset Management LLC
701 13th Street, NW, Suite 1000
Washington, D.C. 20005
Phone: 202-715-9555
Fax No.: 202-715-9699
Email: dsmith@cwcapital.com

Name: Kinnery Ardeshna
Address: CWCapital Asset Management LLC
701 13th Street, NW, Suite 1000
Washington, D.C. 20005
Phone: 202-715-9582
Fax No.: 202-715-9699
Email kardeshna@cwcapital.com

Borrower's Representatives:

David M. Clapper
36700 Grand River Ave.
Farmington Hills, Mi 48335
248-442-2700
248-442-1488 fax
clapperdm@yahoo.com

Andrew Mychalowych
37000 Grand River Ave.
Farmington Hills, MI 48335
248-442-0510
248-442-0518 fax
amychalowych@smvf-law.com

Joseph Vindici
554 Whitehall Rd
Bloomfield Hills, MI 48304
248-760-1011
jvindici@yahoo.com

APPENDIX C

[LOGO] **House Legislative Analysis Section**

Olds Plaza Building,
10th Floor
Lansing, Michigan 48909
Phone: 517/373-6466

FORECLOSURE PROCEEDINGS

House Bill 5721
Sponsor: Rep. Gary Randall
Committee:
Business and Finance

Complete to 9-12-94

A SUMMARY OF HOUSE BILL 5721 AS INTRODUCED 9-13-94

The Revised Judicature Act governs the prerequisites of the sale, notice of foreclosure and publication, sale mechanisms, and redemption procedures that control mortgage foreclosures by advertisement. Among other things, the act requires that a mortgage that contains a power of sale be properly recorded. In addition, if the mortgage has been assigned (transferred), all assignments must be recorded. House Bill 5721 would delete this latter provision, and would require, instead, that only assignments for the foreclosing party be recorded, and then only if the party foreclosing were not the original mortgagee.

The act also requires that, before a property can be redeemed from foreclosure, a mortgagor must repay, with interest, the costs of taxes or insurance premiums paid by the foreclosure purchaser. House

Bill 5721 would require also that amounts paid for senior liens or encumbrances be repaid..

MCL 600.4304 et al.

[LOGO] **House Legislative Analysis Section**

Olds Plaza Building,
10th Floor
Lansing, Michigan 48909
Phone: 517/373-6466

FORECLOSURE BY ADVERTISEMENT

House Bill 5721
(Substitute H-1)
First Analysis (9-20-94)

Sponsor:
Rep. Gary L. Randall
Committee:
Business and Finance

THE APPARENT PROBLEM:

The Revised Judicature Act (RJA) sets forth the procedures for foreclosing by advertisement, by far the most common method of foreclosure, which involves publication and posting of foreclosure and sale notices. (For simplicity, this analysis will refer to "foreclosure" to mean foreclosure by advertisement under the applicable article of the Revised Judicature Act.) Recent decisions of the Michigan Supreme Court have suggested that the foreclosure procedures of the act must be strictly followed.

In its 1993 decision on *Senters v Ottawa Savings Bank* (443 Mich 45), the court held that foreclosure sales by advertisement are defined and regulated by statute. The court said that once a mortgagee elects to foreclose by this method, Chapter 32 of the Revised Judicature Act governs the prerequisites of the sale, notice of foreclosure and publication, mechanisms of the sale, and redemption. This reasoning was used to uphold a former mortgagor's redemption of property from the foreclosure sale purchaser (who was also the

original mortgagee, or mortgage lender) without reimbursing the mortgagee/purchaser for a construction lien it had paid following its purchase of the property at its own foreclosure sale. Since statute did not require reimbursement for such liens under such circumstances, the property could be redeemed without the mortgagor paying that sum in addition to the statutorily-prescribed amounts.

Of more urgent concern to many, however, are the potential ramifications of a more recent supreme court response to an unpublished decision of the court of appeals. In May 1993, the court of appeals issued its first decision in *Arnold v DMR Financial Services* (No. 90-00778), a case in which the mortgagor challenged foreclosure of a mortgage that had been assigned to the Guaranty National Mortgage Association (GNMA). The RJA provides in part that as a condition of foreclosing by advertisement, "the mortgage containing such power of sale has been duly recorded; and if it shall have been assigned, that all assignments thereof shall have been recorded." In accordance with standard GNMA procedures, the assignment had not been recorded, and Ms. Arnold challenged the foreclosure on the basis that not all assignments had been recorded. The court of appeals initially ruled against Ms. Arnold, saying that the mortgage had not been harmed by the failure to record, and that there was no reason to void the sale. Ms. Arnold appealed to the supreme court, which, instead of granting leave to appeal, remanded the case to the court of appeals for reconsideration in

light of *Senters*. The court of appeals, citing *Senters*, subsequently ruled in favor of Ms. Arnold, ruling the foreclosure sale void because the assignment to GNMA had not been recorded as required by the RJA. The case is now being appealed to the supreme court, which has not yet decided whether to grant leave to appeal.

The decision has raised concern among mortgage experts, who say that the purpose of the statutory requirement to record assignments of a mortgage is to ensure that the entity publishing the notice holds record title to the property. Thus, someone facing foreclosure can go to the register of deeds to find out who are the parties with whom the person must negotiate to retain his or her property. GNMA assignments, on the other hand, do not operate to transfer title; assigning a mortgage to GNMA means that GNMA guarantees that purchasers of the mortgage on the secondary mortgage market will receive payments due from the original mortgagee/lender. Mortgage payments continue to be collected by the original mortgagee/lender from the mortgagor/borrower, and it is to this lender, not GNMA, that foreclosure powers belong. Critics point out that for statute to require that an assignment to GNMA be recorded would be to saddle GNMA with administrative duties it neither wants nor can manage.

To address concerns raised by the *Senters* decision and subsequent court action, amendments to foreclosure procedures have been proposed.

THE CONTENT OF THE BILL:

The bill would amend Chapter 32 of the Revised Judicature Act to:

** delete a requirement that all assignments of a mortgage must have been recorded as a prerequisite for foreclosure.

** state that the party foreclosing the mortgage must be either the owner of the indebtedness (or of an interest in it) or the servicer of the mortgage. If the party foreclosing is not the original mortgagee, the mortgage would have to have been assigned of record to the party foreclosing the mortgage.

** require someone redeeming property sold at a foreclosure sale to reimburse the purchaser for amounts paid to redeem senior liens from foreclosure.

MCL 600.3204 et al.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bill has no fiscal implications. (9-19-94)

ARGUMENTS:

For:

The bill would provide a speedy resolution to problems raised by recent court decisions. Of particular concern is a court of appeals decision that all mortgage assignments must be recorded with the register

of deeds in order for a foreclosure to go forward. For mortgages that have been sold on the secondary mortgage market, especially those backed by GNMA ("Ginnie Mae"), the Federal Home Loan Mortgage Corporation ("Freddie Mac"), and the Federal National Mortgage Association ("Fannie Mae"), the decision of the court of appeals is problematic: these entities almost invariably merely have a security assigned to them, not a record title. They do not have, nor are they in a position to assume, the role played by the original mortgagee, who services the mortgage and proceeds with any foreclosure. By eliminating an overbroad requirement for all assignments to be recorded, and by linking foreclosure authority to mortgage servicing (with certain exceptions for flexibility), the bill would better reflect the real world of mortgage finance.

For:

The bill would require someone redeeming property from foreclosure to reimburse the purchaser for any amounts paid to discharge senior liens (such as construction liens) from foreclosure. The bill thus would restore a basic fairness to the law, enabling foreclosure purchasers to receive sums they paid out to lienholders.

Against:

There is a public interest in seeing redemptions go forward; people facing temporary hardship should

have every reasonable chance to keep their homes. The bill, by adding to the sums that would have to be reimbursed by people trying to redeem their homes following foreclosure, would tend to make redemption more expensive and thus more difficult to do.

POSITIONS:

The Financial Institutions Bureau supports the bill. (9-16-94)

The Michigan Land Title Association supports the bill. (9-16-94)

The Michigan League of Savings Institutions supports the bill. (9-16-94)

Michigan Legal Services has concerns about the bill, and does not support it at this time. (9-16-94)

[LOGO] **House Legislative Analysis Section**

Olds Plaza Building,
10th Floor
Lansing, Michigan 48909
Phone: 517/373-6466

FORECLOSURE BY ADVERTISEMENT

House Bill 5721 as enrolled
Public Act 327 of 1994
Second Analysis (2-15-95)

Sponsor:
Rep. Gary L. Randall
House Committee:
Business and Finance
Senate Committee:
Corporations and
Economic Development

THE APPARENT PROBLEM:

The Revised Judicature Act (RJA) sets forth the procedures for foreclosing by advertisement, by far the most common method of foreclosure, which involves publication and posting of foreclosure and sale notices. (For simplicity, this analysis will refer to "foreclosure" to mean foreclosure by advertisement under the applicable article of the Revised Judicature Act.) Recent decisions of the Michigan Supreme Court have suggested that the foreclosure procedures of the act must be strictly followed.

In its 1993 decision on *Senters v Ottawa Savings Bank* (443 Mich 45), the court held that foreclosure sales by advertisement are defined and regulated by statute. The court said that once a mortgagee elects to foreclose by this method, Chapter 32 of the Revised Judicature Act governs the prerequisites of the sale, notice of foreclosure and publication, mechanisms of

the sale, and redemption. This reasoning was used to uphold a former mortgagor's redemption of property from the foreclosure sale purchaser (who was also the original mortgagee, or mortgage lender) without reimbursing the mortgagee/purchaser for a construction lien it had paid following its purchase of the property at its own foreclosure sale. Since statute did not require reimbursement for such liens under such circumstances, the property could be redeemed without the mortgagor paying that sum in addition to the statutorily-prescribed amounts.

Of more urgent concern to many, however, are the potential ramifications of a more recent supreme court response to an unpublished decision of the court of appeals. In May 1993, the court of appeals issued its first decision in *Arnold v DMR Financial Services* (No. 90-00778), a case in which the mortgagor challenged foreclosure of a mortgage that had been assigned to the Guaranty National Mortgage Association (GNMA). The RJA provides in part that as a condition of foreclosing by advertisement, "the mortgage containing such power of sale has been duly recorded; and if it shall have been assigned, that all assignments thereof shall have been recorded." In accordance with standard GNMA procedures, the assignment had not been recorded, and Ms. Arnold challenged the foreclosure on the basis that not all assignments had been recorded. The court of appeals initially ruled against Ms. Arnold, saying that the mortgage had not been harmed by the failure to record, and that there was no reason to void the sale.

Ms. Arnold appealed to the supreme court, which, instead of granting leave to appeal, remanded the case to the court of appeals for reconsideration in light of *Senters*. The court of appeals, citing *Senters*, subsequently ruled in favor of Ms. Arnold, ruling the foreclosure sale void because the assignment to GNMA had not been recorded as required by the RJA. The case is now being appealed to the supreme court, which has scheduled oral arguments for early March 1995.

The decision has raised concern among mortgage experts, who say that the purpose of the statutory requirement to record assignments of a mortgage is to ensure that the entity publishing the notice holds record title to the property. Thus, someone facing foreclosure can go to the register of deeds to find out who are the parties with whom the person must negotiate to retain his or her property. GNMA assignments, on the other hand, do not operate to transfer title; assigning a mortgage to GNMA means that GNMA guarantees that purchasers of the mortgage on the secondary mortgage market will receive payments due from the original mortgagee/lender. Mortgage payments continue to be collected by the original mortgagee/lender from the mortgagor/borrower, and it is to this lender, not GNMA, that foreclosure powers belong. Critics point out that for statute to require that an assignment to GNMA be recorded would be to saddle GNMA with administrative duties it neither wants nor can manage.

To address concerns raised by the *Senters* decision and subsequent court action, amendments to foreclosure procedures have been proposed.

THE CONTENT OF THE BILL:

The bill would amend Chapter 32 of the Revised Judicature Act to:

** Delete a requirement that all assignments of a mortgage must have been recorded as a prerequisite for foreclosure.

** State that the party foreclosing the mortgage must be either the owner of the indebtedness (or of an interest in it) or the servicing agent of the mortgage. If the party foreclosing is not the original mortgagee, there would have to be a record chain of title evidencing the assignment of the mortgage to the party foreclosing the mortgage.

** Require someone redeeming property sold at a foreclosure sale to reimburse the purchaser for amounts paid to redeem senior liens from foreclosure. If the redemption payment included an amount used to redeem a senior lien from a nonjudicial foreclosure, the mortgagor would have the same defenses against the purchaser with respect to the amount used to redeem the senior lien as the mortgagor would have had against the senior lien.

MCL 600.3204 et al.

FISCAL IMPLICATIONS:

The Senate Fiscal Agency has reported that the bill would not have a regulatory or fiscal impact on the Department of Commerce or on other agencies of state government. No mandated costs would be imposed on local governmental units. (12-1-94)

ARGUMENTS:

For:

The bill would provide a speedy resolution to problems raised by recent court decisions. Of particular concern is a court of appeals decision saying that all mortgage assignments must be recorded with the register of deeds in order for a foreclosure to go forward. For mortgages that have been sold on the secondary mortgage market, especially those backed by GNMA ("Ginnie Mae"), the Federal Home Loan Mortgage Corporation ("Freddie Mac"), and the Federal National Mortgage Association ("Fannie Mae"), the decision of the court of appeals is problematic: these entities almost invariably merely have a security assigned to them, not a record title. They do not have, nor are they in a position to assume, the role played by the original mortgagee, who services the mortgage and proceeds with any foreclosure. By eliminating a confusingly overbroad provision for all assignments to be recorded, and by linking foreclosure authority to mortgage servicing (with certain exceptions for flexibility), the bill would better reflect the real world of mortgage finance.

For:

The bill would require someone redeeming property from foreclosure to reimburse the purchaser for any amounts paid to discharge senior liens (such as construction liens) from foreclosure. The bill thus would restore a basic fairness to the law, enabling foreclosure purchasers to receive sums they paid out to lienholders.

Against:

There is a public interest in seeing redemptions go forward; people facing temporary hardship should have every reasonable chance to keep their homes. The bill, by adding to the sums that would have to be reimbursed by people trying to redeem their homes following foreclosure, would tend to make redemption more expensive and thus more difficult to do.

APPENDIX D

STATE OF MICHIGAN

MIKE COX, ATTORNEY GENERAL

MORTGAGES: Necessity of recording mortgages before initiating foreclosure by advertisement

RECORDS AND RECORDATION:

A mortgagee cannot validly foreclose a mortgage by advertisement unless the mortgage and all assignments of that mortgage (except those assignments effected by operation of law) are entitled to be, and have been, recorded. In a foreclosure of a mortgage by advertisement, an assignee who holds the mortgage at the time the foreclosure proceedings commence must be named in the published notice of sale. If a foreclosing mortgagee or assignee does not have a recorded interest on the date the foreclosure by advertisement commences, the notice given by advertisement does not satisfy the statutory requirements for publication and may be the basis for asserting that the mortgage has not been validly foreclosed.

Opinion No. 7147

January 9, 2004

Honorable Michael D. Bishop
State Senator
The Capitol
Lansing, MI 48909

You have asked: a) whether a mortgagee initiating foreclosure of a mortgage by advertisement must have a duly recorded and complete chain of title to the

mortgage being foreclosed before the mortgagee commences advertising the sale; and b) if a foreclosing mortgagee does not have a recorded interest as of the date on which foreclosure by advertisement commences, whether this omission renders any subsequent sale voidable by the mortgagor or a party claiming through the mortgagor.

The foreclosure of a mortgage by advertisement is governed by Chapter 32 of the Revised Judicature Act (RJA), MCL 600.3201 through 600.3280. MCL 600.3204 provides in pertinent part:

> (1) A party may foreclose by advertisement if all of the following circumstances exist:
>
> (a) A default in a condition of the mortgage has occurred, by which the power to sell became operative.
>
> (b) A suit or proceeding has not been instituted, at law, to recover the debt then remaining secured by the mortgage, or any part of the mortgage; or if a suit or proceeding has been instituted, the suit or proceeding has been discontinued; or an execution upon the judgment rendered in a suit or proceeding has been returned unsatisfied, in whole or in part.
>
> (c) The mortgage containing the power of sale has been properly recorded and, *if the party foreclosing is not the original mortgagee, a record chain of title exists evidencing the assignment of the mortgage to the party foreclosing the mortgage.*

> (d) The party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage. [Emphasis added.]

MCL 600.3208 provides:

> Notice that the mortgage will be foreclosed by a sale of the mortgaged premises, or some part of them, shall be given by publishing the same for 4 successive weeks at least once in each week, in a newspaper published in the county where the premises included in the mortgage and intended to be sold, or some part of them, are situated. If no newspaper is published in the county, the notice shall be published in a newspaper published in an adjacent county. In every case within 15 days after the first publication of the notice, a true copy shall be posted in a conspicuous place upon any part of the premises described in the notice.

The Michigan Land Title Standards (5th Edition) published by the Land Title Standards Committee of the Real Property Law Section of the State Bar of Michigan is an authoritative source that has been relied upon by property law practitioners in Michigan for nearly 50 years. Michigan Land Title Standard 16.12 relates to your question and recites:

> STANDARD: A MORTGAGE CANNOT BE VALIDLY FORECLOSED BY ADVERTISEMENT UNLESS THE MORTGAGE AND

> ALL ASSIGNMENTS THEREOF, EXCEPT SUCH ASSIGNMENTS AS HAVE BEEN EFFECTED BY OPERATION OF LAW, ARE ENTITLED TO BE, AND HAVE BEEN RECORDED.

The committee then illustrates how the standard applies by setting forth the following hypothetical problem, an answer to that problem, and the legal authority that supports that answer:

> Problem A: Robert Brown mortgaged Blackacre to Edward Lane. Lane assigned the mortgage to Arthur Mills. The assignment was either unrecorded or, although actually recorded, was not entitled to be recorded. Mills foreclosed the mortgage by advertisement and a sheriff's deed purporting to convey Blackacre was recorded. Was the foreclosure valid?
>
> Answer: No. To foreclose a mortgage by advertisement validly, the mortgage and all assignments thereof must be entitled to record and be recorded.

The standard cites MCL 600.3204(3) and *Dohm v Haskin*, 88 Mich 144; 50 NW 108 (1891), as support for its answer.

As the Michigan Supreme Court in *Dohm* explained, "the right to foreclose by advertisement is conferred solely by the statute, and its provisions must be strictly complied with. Under this statute, the mortgage and assignment must not only be recorded,

but they must be executed in such a manner as to entitle them to record." 88 Mich at 147.

In the *Dohm* case, the assignment of the mortgage was executed in Kansas. It had only one witness. It purported to be acknowledged before a notary public. No certificate of a clerk or proper certifying officer of a court of record was attached as required by the then effective statutes. How. Stat. § 5660. As the Court indicated, the instrument "was therefore not entitled to record, and the register of deeds should have refused to record it." *Id.*

Another relevant provision of the RJA is MCL 600.3212, which states:

> Every notice of foreclosure by advertisement shall include all of the following:
>
> (a) The *names of* the mortgagor, the mortgagee, and *the foreclosing assignee of a recorded assignment of the mortgage*.
>
> (b) The date of the mortgage and the date the mortgage was recorded.
>
> (c) The amount claimed to be due on the mortgage on the date of the notice.
>
> (d) A description of the mortgaged premises that substantially conforms with the description contained in the mortgage.
>
> (e) For a mortgage executed on or after January 1, 1965, the length of the redemption period as determined under section 3240. [Emphasis added.]

Michigan Land Title Standard 16.18 states:

> STANDARD: IN FORECLOSURE OF A MORTGAGE BY ADVERTISEMENT, AN ASSIGNEE WHO HOLDS THE MORTGAGE AT THE TIME OF FORECLOSURE MUST BE NAMED IN THE PUBLISHED NOTICE OF SALE.

This standard is explained by the committee with the following problem and answer:

> Problem: A mortgage was assigned of record to Arthur Mills. Mills foreclosed it by advertisement. The published notice of sale did not set forth the assignment. Is the notice sufficient?
>
> Answer: No. The statute requires that the assignee be named in the notice.

The committee cites MCL 600.3212 as the authority supporting this answer.

Neither of the quoted land title standards addresses directly the factual scenario where a mortgagee or a mortgagee's assignee initiates foreclosure by advertisement, but the initial published notification either fails to name the assignee, or, while naming the assignee, names an assignee who is not of record. This scenario raises the question whether a mortgagee or mortgagee's assignee under these circumstances can cure the error by recording the assignment and naming the assignee in subsequent notices published before the sheriff conducts the sale involved.

With respect to the attempt to cure the omissions in the first of the successive required publications, a faulty initial publication cannot be offered as satisfying the RJA's publication requirements. The first *correct* publication is the first publication that can be relied upon in asserting that publication has been properly accomplished for four successive weeks.

With respect to the assignment of a mortgage after the initial publication, it is my understanding that the State Bar Land Title Standards Committee, in editing Michigan Land Title Standard 16.18 for future publication, has added a "Comment C," which will recite:

> The Committee expresses no opinion as to the effect of an assignment of the foreclosing assignee's interest after the publication of the initial notice of sale.

In other words, the Committee's future publication will decline to address this factual scenario in the absence of sufficient statutory or case authority.

The State Bar Land Title Standards Committee's comment confirms that this is an area in need of legislative treatment. Since, as stated in *Dohm*, the right to foreclose by advertisement "is conferred solely by . . . statute," I must also defer to the legislative process to address this gap in the law. Indeed, you have indicated in your letter that you are concerned that not all mortgagees are following the same practice in this area and that you plan to deal with

this and related problems by proposing appropriate legislation to bring needed clarity to the issue.

It is my opinion, therefore, that a mortgagee cannot validly foreclose a mortgage by advertisement unless the mortgage and all assignments of that mortgage (except those assignments effected by operation of law) are entitled to be, and have been, recorded. In a foreclosure of a mortgage by advertisement, an assignee who holds the mortgage at the time the foreclosure proceedings commence must be named in the published notice of sale. If a foreclosing mortgagee or assignee does not have a recorded interest on the date the foreclosure by advertisement commences, the notice given by advertisement does not satisfy the statutory requirements for publication and may be the basis for asserting that the mortgage has not been validly foreclosed.

MIKE COX
Attorney General

Editor's Note: After OAG No 7147 was released, 2004 PA 186 was enacted into law and given immediate effect (July 1, 2004). This act amended MCL 600.3204(3) to provide: "If the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist prior to the date of sale under section 3216 evidencing the assignment of the mortgage to the party foreclosing the mortgage." Accordingly, OAG No 7147 has been superseded by subsequent legislative action.